

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
ATLANTA BRANCH OFFICE

**G4S REGULATED SECURITY  
SOLUTIONS, A DIVISION OF  
G4S SECURE SOLUTIONS (USA) INC.  
f/k/a THE WACKENHUT CORPORATION**

**and**

**CASE 12–CA–26644**

**THOMAS FRAZIER, an Individual**

**and**

**CASE 12–CA–26811**

**CECIL MACK, an Individual**

*Shelley Plass, Esq.,*  
for the Acting General Counsel<sup>1</sup>  
*Fred Seleman, Esq.,* for the Respondent.<sup>2</sup>

**DECISION**

**Statement of the Case**

**WILLIAM N. CATES, Administrative Law Judge.** These are two discharge cases I heard in Miami, Florida, commencing on April 4, 2011. The cases originate from a charge filed by Thomas Frazier, an individual (Frazier) on February 22, 2010, in Case 12–CA–26644 and filed by Cecil Mack, an individual (Mack) on July 29, 2010 in Case 12–CA–26811, against G4S Regulated Security Solutions, a Division of G4S Secure Solutions (USA) Inc. f/k/a The Wackenhut Corporation (Company). The prosecution of these cases was formalized on December 29, 2010, when the Regional Director for Region 12 of the National Labor Relations Board (the Board), acting in the name of the Board’s Acting General Counsel, issued a complaint and notice of hearing (complaint) against the Company.

---

<sup>1</sup> I shall refer to counsel for the Acting General Counsel as counsel for the Government and to the Acting General Counsel as the Government.

<sup>2</sup> I shall refer to counsel for the Respondent as counsel for the Company and I shall refer to the Respondent as the Company.

It is specifically alleged the Company, on or about February 2, 2010, indefinitely suspended its employee Mack and thereafter on February 15, 2010, discharged him; and, on or about February 12, 2010, indefinitely suspended its employee Frazier and thereafter on or about February 15, 2010 discharged him because the two engaged in protected concerted activities and to discourage employees from engaging in these or other concerted activities. It is alleged the Company's actions violate Section 8(a)(1) of the National Labor Relations Act (the Act).

The Company, in a timely filed answer to the complaint, denied having violated the Act in any manner alleged in the complaint. The Company, as one affirmative defense, asserts Mack and Frazier were supervisors of the Company within the meaning of Section 2(11) of the Act and thus not protected by the Act.

The parties were given full opportunity to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the witnesses as they testified and I rely on those observations in making credibility determinations herein. I have studied the whole record, the posttrial briefs, and the authorities cited therein. Based on the detailed findings and analysis below, I conclude and find, that at all times material herein, Frazier and Mack served as supervisors of the Company within the meaning of the Act and outside the Act's protection. I find the Company did not violate the Act when it suspended and thereafter discharged Frazier and Mack.

### Findings of Fact

#### I. Jurisdiction, Labor Organization Status, and Supervisory/Agency Status

The Company is a Delaware Corporation engaged in the business of providing guard and security services to clients throughout the United States, including the Florida Power & Light Company's powerplant located at Turkey Point in Miami-Dade County, Florida (Turkey Point) and other facilities located in the State of Florida. During the 12-month period ending December 29, 2010, a representative period, the Company purchased and received at Turkey Point, and at its other facilities located in the State of Florida, goods and services valued in excess of \$50,000 directly from points outside the State of Florida. The evidence establishes, the parties admit and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties admit, and I find, International Union, Security, Police and Fire Professionals of America (SPFPA) (Union) is, and has been, a labor organization within the meaning of Section 2(5) of the Act.

It is admitted Security Shift Supervisor Quentin Ferrer, Leadership Development Coordinator Karen Bower Macdonald, Project Manager Michael Mareth, Security Shift Supervisor Gonzalo Pedroso, and Operations Manager Juan Rodriguez are supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act.

The first, fundamental and controlling issue is whether security lieutenants Frazier and Mack, at material times herein, were supervisors for the Company within the meaning of Section 2(11) of the Act. If they were supervisors they would not be protected by the Act and the Company's suspending and discharging them would not violate the Act. In as much as I find the two to be supervisors the remaining issues need not be addressed, namely, whether Frazier and Mack engaged in concerted activities protected by the Act and whether they were discharged for doing so. Nor is it necessary to address the Company's affirmative defense that Frazier and Mack were discharged for valid considerations not based on unlawful motives or considerations.

## II. Alleged unfair Labor Practices

### A. Facts

#### 1. Background

The Company provides guard and security services for Florida Power & Light at its Turkey Point (Miami/Dade County, Florida) nuclear generating stations. The Company provides its services pursuant to a written agreement with Florida Light & Power and provides its services supportive of, and in compliance with, site security programs which in turn are in compliance with Nuclear Regulatory Commission requirements, specifically Title 10, Code of Federal Regulations 73.55. Florida Power & Light owns several thousand acres at its Turkey Point Nuclear Power Plant facility for which various levels of security are furnished by the Company. Included in Florida Power & Light's Turkey Point property is an area referred to as the "owner controlled area" which contains security fences and intrusion detection devices. Within the protected area is a vital area which contains the power block where the generating stations are that actually produce electrical power. The security provided in all areas includes, as applicable, patrols, duty stations and other personnel in various capacities. The Company has provided its services at Turkey Point for approximately 27 years and the Company's current contract with Florida Power & Light expires December 31, 2011.

The Company's current name came into effect in 2009, however, prior to that date it, for an extended time, operated as The Wackenhut Corporation. According to Project Manager Mareth, the Company's contract with Florida Power & Light sets forth a description of the type of security services the Company is to perform. The agreement also sets forth the general staffing requirements and establishes procedures to amend the agreement if it is necessary to change the staffing requirements. Project Manager Mareth stated that generally the security officers performing security services at Turkey Point do not change if the contract is awarded to a different security company. It appears the staffing provisions in the agreement between Florida Power & Light and the Company have remained the same.

The Board in *Wackenhut Corp.* 345 NLRB 850 (2005), sets forth a somewhat detailed history of labor relations between the Union and Company herein. A "brief" review of that history, taken from that Board case, without further referencing that case, is perhaps helpful. Prior to September 1, 2003, the Company employed four categories of employees at its

Turkey Point facility, namely; captains, lieutenants, sergeants, and security officers. Specifically in July 1999, the Board certified the Union as representative of the Company's security officers at Turkey Point. The Board noted the category "security officer" included central and secondary alarm station operators, unarmed security officers/watchmen, and part-time security officers. Prior to the election that resulted in the above unit being certified the Company stipulated it did not oppose the inclusion of the central and secondary alarm station operators in the bargaining unit. In 2002, the Union filed a petition seeking to represent the sergeants at Turkey Point. The Company opposed the petition, asserting the sergeants were statutory supervisors. The Regional Director of Region 12 of the Board issued a decision and direction of election, in which she found the sergeants were not supervisors under the Act. The Board denied the Company's request for a review of the Director's decision. On March 4, 2003 the Union was certified as the representative of the Company's sergeants.

On May 28, 2003, Florida Power & Light issued a request for proposals with bid specifications for a new security contract setting forth staffing provisions which provided that supervisors would be defined as nonbargaining personnel and that all personnel assigned to operate the central and secondary alarm stations would be supervisors. Further, the new contract specifications called for four security shifts per day with each shift supervisor trained and certified to perform duties within the central and secondary alarm stations, as well as to perform other duties in the owner controlled and protected areas. In June 2003, the Company notified Florida Power & Light that if it was awarded the new contract operations at Turkey Point it would change its operations in three ways: (1) The part-time program would be eliminated; (2) The central and secondary alarm station operators would be supervisors, and (3) The position of sergeant would be eliminated. The Company was thereafter awarded the new security contract with Florida Power & Light.

After obtaining the new contract with Florida Power & Light, the Company announced a posting for new supervisory positions with a requirement that applicants be able to operate the central and secondary alarm stations. The Company then filled 15 lieutenant positions by promoting unit employees into the new positions. Starting on September 1, 2003, all central and secondary alarm station duties were performed by lieutenants. As a result of the changes implemented on September 1, 2003, the Company no longer employed anyone in sergeant positions. The Board found the Company violated the Act by eliminating the sergeant positions and by eliminating the central and secondary security operators from the bargaining unit and reclassifying the operators as nonunit lieutenants. The Board also concluded the Company had failed to establish the new lieutenants "assigned to perform CAS/SAS [central alarm station/secondary alarm station] possessed or exercised supervisory authority."

With that brief review, I now turn to the facts surrounding the issues herein. The Company's highest ranking individual at Turkey Point is Project Manager Mareth. He is assisted by Operations Coordinator Rodriguez, Training Coordinator Roy McCloud, Leadership Development Manager Macdonald, and various other administrative personnel. There are five security officer shifts. Each shift has 1-team shift captain, 7 lieutenants, and approximately 37 security officers assigned. The security teams are referred to as Alpha, Bravo, Charley, Delta, and Echo. The Echo team is a training team that actually fills in for

each of the other four teams as each team must rotate into a week of security training every 5 weeks. There are four teams performing security services and one team in training at all times. At applicable times herein (February 2010) there were approximately 170 security officers employed at Turkey Point.

The current applicable unit description for security officers follows:

The Company recognizes the International Union, Security, Police, Fire Professionals of America (SPFPA) and its Amalgamated Local No. 610 as the exclusive collective bargaining representative for all employees designated by the National Labor Relations Board's Certification of Representative issued on July 8, 1999 in case No. 12-RC-8349, including all security officers, and watchpersons [Unarmed Officers], performing guard duties as defined in Section 9(b)(3) of the National Labor Relations Act, as amended, who are employed by the Employer at the Turkey Point Nuclear Power Plant, located in Florida City, Florida; but excluding all office clerical employees, professional employees and supervisors as defined in the National Labor Relations Act, as amended.

Frazier was hired as a security officer in 1989 and Mack in 2002. Both were promoted to lieutenant in 2003. Both Frazier and Mack were suspended from work a few days before they were terminated on February 15, 2010. Frazier's termination notice reflects "Failure to meet satisfactory leadership expectations." Mack's termination notice reflects "Cecil was involved in an incident with the client that involved undesired behavior. As a part of the process management completed a review of Cecil's personnel file. As a result of the review it is management's perspective that Cecil's performance does not meet satisfactory job performance or behavior standards."

## **2. Company's evidence**

As noted earlier the Company, asserts as an affirmative defense, that Frazier and Mack were supervisors within the meaning of Section 2(11) of the Act. With that assertion the Company assumes the burden of proving their supervisory status. I consider the Company's evidence first as it is the party asserting the supervisor status and afterward, I shall consider evidence presented by the Government bearing on the issue.

I note the position of lieutenant existed prior to Frazier and Mack applying for and being promoted to lieutenants in the fall of 2003. Frazier and Mack received pay raises at the time of their promotions. Project Manager Mareth testified the pay differential between security guards, which Frazier and Mack were, and lieutenants, to which they were promoted, was approximately \$4 per hour. Lieutenants Frazier and Mack received more life insurance coverage than the security officers. Project Manager Mareth testified when an employee is promoted to lieutenant he/she is given additional training not provided to the security officers. The additional training is designed to, in part; give the lieutenant "a better understanding of . . . performing oversight and observation of day-to-day activities" a lieutenant will encounter. Mareth further explained the training for lieutenants is at a "higher level" than training for the

security officers. Leadership Development Coordinator Macdonald testified she conducts 80 hours of initial leadership training with lieutenants that includes interpersonal and presentation skills, training which is not provided to the security officers. Lieutenants also receive, on an ongoing basis, training not provided to the security officers. Lieutenants meet with upper management at least once per month without security officers being present.

Newly selected lieutenants, including Frazier and Mack, signed various documents after becoming lieutenants they had not been required to sign as security officers. One such form was a "Supervisory Requirements" form. On the "Supervisory Requirements" form lieutenants are instructed they should use coaching techniques as well as counseling and progressive discipline to correct unprofessional conduct and poor job performances and are to do so fairly and consistently. On the form lieutenants are instructed to seek management assistance and input when needed. Frazier and Mack acknowledged, on the signed forms, they were to "[m]ake those accountable to [them] aware of what [they] expect[ed] from them". The two acknowledge on the signed forms they were to "lead by example" and "keep issues discussed between supervisors confidential." Frazier and Mack specifically understood the Company viewed them as supervisors. Frazier and Mack each signed a Company "Leadership Pledge" agreement in which they agreed they would not tolerate inattentiveness within the ranks of their direct reports; they would be receptive to concerns and questions raised by their direct reports; they would not tolerate retaliation or peer harassment within the ranks of their direct reports; they would be observant to the work place behaviors of their direct reports; they would listen effectively and respond appropriately to their direct reports; they would use a nonthreatening communication style with their direct reports; and, they would develop, coach, mentor and train their direct reports. In signing the "Leadership Pledge" both wrote the description of their position as that of "Supervisor."

Frazier and Mack also executed "Management Challenge" forms in which they acknowledged that as part of the "management team" they had an "obligation to operate above the standard expectations" of their colleagues and being in supervision carried an accountability on their part for their teams performance. Both acknowledged the Company is committed to supporting them with relevant training to be successful supervisors and they were aware of what it meant to supervise armed personnel and that management standards for its supervisors in this type environment had to be exceptionally high.

Local Union 610 President and security officer Timothy Lambert testified regarding the duties of Frazier and Mack, in part, as follows:

As long as I've known them and they were supervisors, . . . I went to them because they cared about what was going on there. I mean they were two excellent supervisors that really cared about the operations.

Local Union President Lambert acknowledged that as a security officer his first line supervisor was the lieutenant.

Project Manager Mareth testified, at length, regarding the position and duties of lieutenants at the Company. There are approximately 170 security officers that report

directly to lieutenants according to Mareth. Lieutenants in turn report to shift captains. Mareth explained the Company's supervisory structure is necessary so one individual, such as the captain, would not be the only one responsible for supervising "30-some officers assigned to [a] particular shift" with the responsibility of covering the several thousands of acres to be secured. Project Manager Mareth testified lieutenants provide direct oversight to the security officers in the field including addressing issues that arise on the job. Project Manager Mareth explained that while the Company is in a "regulated industry" with "a lot of procedures for what we do, you can't have a written procedure for absolutely everything that you do in the field." Mareth added lieutenants "have to utilize judgment and discretion" in performing their functions and may not have "a written line item that tells [them] what to do." Mareth said lieutenants "can either address [the issues] at their level, or if its something that they cannot address, then they can push it to a higher level and it just continues all the way up...to my [Project Manager] level . . ." Mareth said lieutenants oversee security officers in all geographic areas at the Turkey Point facility and their oversight includes evaluation of the security officers.

Florida Power & Light's Turkey Point Nuclear Plant Security Department, Security Force Instruction 1106, Revision 9 titled "Field Supervisors" is applicable to the Company herein and, "provides guidance to Security Field Supervisors for performing supervisory functions of Security Officers manning security posts and assisting the Security Shift Supervisor in carrying out daily Security Operations." The title "field supervisor" and "lieutenant" refers to the same position at the Company. Field supervisors are directed to ensure; that only qualified security officers are assigned to posts; that security officers understand the specific requirements of their post; that security officers remain alert, attentive, and properly perform their duties; that security officers perform their duties in a safe environment; that security officers properly maintain post reports; and, that field supervisors initiate prompt and appropriate actions to correct any identified deficiencies including improper behavior, attitude, or inattentiveness to duty.

Project Manager Mareth described, in general terms, a lieutenant's workday. The day starts with the morning shift briefing conducted by the shift captain with, as appropriate, input from the lieutenants. Lieutenants ensure the "off-going" security officers are properly relieved and then issues weapons to the "on-coming" security officers. Lieutenants perform equipment inventories which includes verifying that the security officers have all required equipment at their posts and are properly logged in and fit for duty. Lieutenants are responsible for monitoring the central and secondary alarm systems. Lieutenants field questions from and address issues raised by the security officers and make required security observation reports. Project Manager Mareth stated lieutenants correct, coach and counsel, as needed. Lieutenants generally do not perform security officer duties.

Project Manager Mareth further explained that lieutenants are the first line supervisors to whom the security officers' report, and can issue any type discipline, excluding termination, without consulting a supervisor. The Company has a three level progressive disciplinary policy that consists of four steps. Step one is oral counseling; step two is written disciplinary counseling; step three is written disciplinary counseling and suspension; and step four is termination of employment. Stated somewhat differently level I, the highest

level, results in termination. Level II is a documented discipline such as written warnings, an accumulation of which results in termination. Level III, the lowest level of discipline, typically starts with a verbal warning or a verbal warning that is documented. The progressive discipline policy and procedure reflects, “There are three levels of offenses (Levels I, II, III). These are only guidelines for use by management and supervisor personnel.” Mareth explained that if a lieutenant issued a written warning to a security officer and the security officer committed a similar infraction such would result in a suspension for the security officer. Project Manager Mareth testified lieutenants may, and do, exercise discretion when issuing discipline pursuant to the Company’s disciplinary policies. For example, a lieutenant may decide *not* to issue formal discipline for an infraction or he/she can decide which level of discipline is appropriate as there is some overlap between offenses listed at the disciplinary levels. Mareth said a lieutenant may consult with the shift captain to determine if a past practice has been established for a particular offense but is not required to do so. According to Mareth lieutenants may, for example, issue a coaching, which is not part of the formal disciplinary procedure unless documented, for a first offense and if there are other like offenses determine at that time which level of discipline is warranted. According to Project Manager Mareth, lieutenants do not have to consult with their supervisor (captains) before issuing discipline. Eight employee disciplinary/corrective action Notices, issued by 6 lieutenants, were received in evidence. Two of the disciplinary actions resulted in written warnings with 1-day suspensions; two involved written warnings only; and, four involved written disciplinary actions documenting oral warnings. Five of the disciplinary actions involved attendance infractions, two involved failure to timely report for training, and one involved a vehicle accident. None of the disciplinary/corrective action notices in evidence was issued by either Frazier or Mack. In fact, neither Frazier or Mack issued any discipline of record.

Project Manager Mareth testified lieutenants perform evaluations for their direct reports. Mareth explained the evaluations are used in the promotional process for the security officers. Mareth named four security officers whose recent promotions were impacted by their lieutenant’s evaluations and added there were perhaps eight other like situations, over the previous year and half. No one higher in management than a lieutenant regularly evaluates, in writing, the security officers. The evaluations prepared by the lieutenants are used in the promotional process in accordance with the Company’s policy manual at “Promotion Policy and Procedure.” The manual states in part, “the promotion process consists of several stages. The required stages are as follows . . . review of performance appraisals.” The portion of the manual covering promotions further states, in part, that the promotion board shall review the personnel file for each applicant for promotion with specific attention given to performance appraisals.

According to Mareth, lieutenants can be disciplined, up to and including discharge, if they fail to ensure the quality of performance of the security officers under their command. Mareth explained that a failure to ensure quality performance by the security officers could also impact promotional opportunities for lieutenants.

With respect to evaluations for the security officers, Charging Party Mack acknowledged that for 2 years prior to his discharge he evaluated the six security officers that



reported directly to him and he did so on a quarterly, as well as, annual basis. Mack said he was told to perform the evaluations by his immediate shift supervisor. Mack explained the evaluations were mainly to set goals for the security officers. Mack went over each evaluation with each security officer involved before he turned the evaluations over to his superior, the shift captain.

Frazier also testified he evaluated the security officers that reported to him on a quarterly and annual basis and was instructed by his immediate supervisor, Captain Ferrer, to do the evaluations starting some 2 years prior to his discharge. Frazier said he individually reviewed the evaluations with each security officer and had them sign their evaluation before he turned the evaluations over to Captain Ferrer. Frazier said he sometimes made Captain Ferrer aware of what he had placed in a security officer's evaluation in case the officer questioned the evaluation. Frazier identified some 83 pages of evaluations, which were received in evidence, he made of certain security officers that reported to him.

### **3. Government's evidence relating to the supervisory issue**

Frazier testified he commenced working for the Company at Turkey Point in May 1989 when it was known as the Wackenhut Corporation. Frazier worked as a security officer when first hired. Frazier described his security officer duties as protecting the plant from radiological sabotage by conducting patrols; standing guard at specific posts; conducting fire watch; fire watch patrols, checking doors, and equipment; responding to contingencies; doing vehicle patrols of owner-controlled areas; working at various entry gates; searching vehicles and materials; and, preventing unauthorized personnel and/or materials from entering the plant. Frazier said he conducted himself, and carried out his assigned duties in accordance with Security Force Instructions established by Florida Light & Power and the Company which provided him guidance on his job functions and instructed him how to react in any given situation. Frazier said that late in his tenure as a security officer he became central and secondary security alarm certified and monitored computer screens for alarms at vital areas or fenced zones. As a certified central and secondary alarm security officer Frazier said he would run reports, answer telephones, provide information to the captains and dispatch officers to alarms in accordance with the Security Force Instructions. Frazier said his overall security officer duties did not change when he became a certified central and secondary security alarm officer that he just assumed the extra duties.

Frazier testified his position "changed slightly" when he became a lieutenant in September 2003 and was assigned to the B Team where he worked 7 12-hour shifts every 14 calendar days and reported to Shift Captain Quentin Ferrer. Frazier described his lieutenant duties as, "ensuring that qualified security officers are manning the various posts, qualified in the SFI [Security Force Instructions]," "to verify the paperwork, to ensure that the general purpose logs and post or patrol logs are correctly filled out," and to, "ensure that the officers were alert, attentive, are aware of their assigned duties as set forth by the general purpose log and the SFIS." Frazier further explained his duties included ensuring the security officers "equipment was in proper working order and not damaged or been tampered with" and to ensure the security officers worked in a safe clean environment and conducted their patrols according to the Security Force Instructions. Frazier said his central and secondary alarm

system duties remained the same as when he was a security officer. Frazier said he knew what all of his duties as a lieutenant were because his duties were written out in the Security Force Instructions, training manuals, administrative directives and by his lengthy experience at Turkey Point. Frazier added there had been sergeant positions at the Company at the time  
 5 he was a security officer but by the time he became a lieutenant in September 2003, the sergeant positions had been eliminated. Frazier explained sergeants “essentially” performed the same tasks he performed as a lieutenant but after further questioning by Government Counsel Frazier stated sergeants and lieutenants performed the same job.

10 Frazier testified he had daily contact with security officers, other lieutenants and at least 1 captain. He said he commenced his work day at the shift briefing attended by those mentioned above, as well as, on occasion Florida Power & Light security oversight specialists and other Company management such as Project Manager Mareth and Operations Coordinator Juan Rodriguez. According to Frazier the shift captain addressed the shift  
 15 collectively and disseminated pertinent information for the day, such as the status of the units, making note of any fence or door zones that might be out of order or any new posts that had been established. According to Frazier the shift captain determined post assignments and reflected those assignments on a post assignment sheet, copies of which were given to the security officers and lieutenants. Frazier explained that with the assignment sheet he knew  
 20 where each of his security officers would be posted and he visited each post during the shift. Frazier said that while he was at each post he verified that the proper security officer was at his/her assigned post and reviewed the general purpose and inventory logs with the security officer as well as checked the security officers weapons. According to Frazier the shift captain never discussed shift rotations with him before issuing them. Frazier said he did not  
 25 direct the work of the security officers that reported to him “because the work is defined in the general purpose log,” “[t]he officer reads that. Those are his post instructions.” Frazier explained his responsibility was just to ensure the security officers understood his/her post instructions. Frazier stated some security officers preferred some posts over other posts and added he had the authority to transfer security officers from one post to another during a shift,  
 30 under some circumstances but, only after requesting approval from the shift captain. On cross-examination, Frazier acknowledged he had stated in a pretrial affidavit he had the authority to transfer a security officer from one post to another on his shift for operational needs and he “did not generally consult with the captain before doing so.”

35 Frazier testified he had given security officers “coachings” which he considered to be “peer checking.” A “coaching”, according to Frazier, may involve instructing a security officer to sit up straight instead of slouching, or to be a little more vigilant in the area where he/she was assigned. Frazier said coaching is not a form of discipline. Frazier said he had never issued discipline to security officers reporting to him because they all knew their jobs.  
 40 Frazier on direct examination, said he could issue oral or written discipline to his security officers for not doing their job duties or being inattentive or not following guidelines in the general purpose log only after first bringing it to the attention of his shift captain to ascertain the appropriate disciplinary action. Frazier acknowledged on cross-examination that specific supervisory requirements applicable to him directed him to not only use coaching techniques  
 45 but to utilize counseling and progressive discipline to correct unprofessional conduct or poor job performance by the security officers.

Frazier testified that about 2 years before his discharge he began to evaluate, on a quarterly and annual basis, those security officers reporting to him. Prior to that time evaluations were performed by the captain. The quarterly evaluations designated as “one-on-one” reviews were, according to Frazier, for the purpose of bringing about improvement in the security officers attendance, communication skills and knowledge of the Security Force Instructions. After preparing the quarterly and annual reviews for his security officers Frazier gave them to his shift captain or Operations Coordinator Rodriguez. Frazier explained he reviewed each evaluation with the applicable security officer before giving them to the captain and, on occasion, would speak with his shift captain about a specific evaluation in case “the officer came back and was questioning it.” Frazier testified, on direct-examination, that as far as he knew the evaluations were used only to “improve the deficiencies that the officers may have.” When asked on cross-examination if a bad evaluation could affect a security officers future promotional opportunities, Frazier testified “. . . as far as I know, the one-on-ones and the evaluations were not used for promotion. They were used . . . to get the officer to improve his performance. I do not know if it was used . . . to promote.” However, after being given an opportunity to review his pretrial affidavit, Frazier acknowledged that if a security officer continually received bad evaluations or reviews the officer “may not be considered for a promotion.” Frazier did not know of any security officer being promoted based on his evaluation of the security officer. Frazier acknowledged he had recommended security officers receive meal tickets or “a letter incentive award” but added even other security officers could recommend a fellow security officer for a meal or small incentive award.

Mack’s testimony, regarding his duties and authority as a lieutenant, though in less detail, was for the most part, the same as Frazier’s testimony. Mack testified that everything he did every minute of every day as a lieutenant was explicitly covered in detail by written policies. Mack likewise believed everything security officers did was covered and/or governed by written policies and the security officers simply had to follow the policies. Mack testified the captain would issue discipline and the lieutenant who was in the area of the security officer disciplined would simply deliver the discipline to that security officer.

### **III. Credibility Comments, Analysis and Conclusions**

I am persuaded Frazier while testifying made an effort to minimize the authority he had and/or exercised as a lieutenant. For example, he testified some officers preferred some posts over other posts and that he had the authority to transfer security officers from one post to another during a shift, but only after requesting approval from his shift captain. However, after being confronted with his pretrial affidavit, he acknowledged he had the authority to transfer a security officer from one post to another on his shift for operational needs and did not generally consult with his captain before doing so. Frazier first testified he could issue oral or written discipline to his assigned security officers for not properly performing their jobs duties, being inattentive, or not following guidelines but, only after first bringing such to the attention of his shift captain. However, Frazier acknowledged, during cross-examination, that specific supervisory requirements applicable to him, called for him to use coaching techniques, as well as, counseling and progressive discipline to correct unprofessional

conduct, or poor job performance by his security officers. Frazier testified on direct examination that evaluations he prepared for the security officers reporting to him were utilized to improve deficiencies the security officers may have, however, on cross-examination, and after reviewing his pretrial affidavit, he acknowledged that if a security officer continually received bad reviews or evaluations he/she may not be considered for promotion.

It is in light of this and other testimony by Frazier and particularly my observation of him as he testified; I am unable to fully credit his testimony regarding his duties and authority where contradicted by the testimony of others or, called into question by documentation. Thus, I have relied, to a great extent, on the testimony of Project Manager Mareth, which I credit, with respect to the duties and authority of lieutenants at the Turkey Point facility.

Under Board and Supreme Court precedent, in order to be a statutory supervisor, an individual must have the authority to effectuate or effectively recommend at least one of the supervisory indicia enumerated in Section 2(11) of the Act, using independent judgment in the interest of the employer. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001)). It is well established that the party asserting supervisory status bears the burden of proof on the issue, *Oakwood Healthcare, Inc.* at 686. The burden must be carried as to each particular individual who is alleged to be a supervisor. Section 2(11) of the Act provides that a supervisor is one who possesses, “authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”

Such statutory indicia must, as noted earlier, be exercised with independent judgment on behalf of management, in the interest of management and not simply in a routine manner. The Board noted in *Oakwood Healthcare Inc.*, supra citing *Chevron Shipping Co.*, 317 NLRB 399, 381 (1995), that as a general principle, it has exercised caution not to construe supervisory status too broadly because the employee deemed a supervisor is denied rights the Act is intended to protect. The Board in *Oakwood Healthcare, Inc.*, supra, adopted definitions for the terms “assign,” “responsibly to direct”, and “independent judgment” as those terms are used in Section 2(11) of the Act. It is helpful to briefly highlight those definitions.

The Board noted the terms “assign” and ‘responsibly to direct” were not intended to be synonymous and would ascribe distinct meanings to both terms. The Board construed “assign” to refer to the act of designating an employee to a place, a time or giving significant overall duties or tasks to an employee. The Board noted the place, time and work of employees are part of their terms and conditions of employment and decisions, or effective recommendations, to affect one of those can be supervisory functions. The Board construed “responsibly to direct” as where the putative supervisor is answerable for the performance and work product of the employees he/she directs. That is, there must be some adverse consequence for the one providing oversight if the tasks performed by the employees are not

performed properly. The Board specifically stated; “Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.”

The Board in ascertaining the contours of “independent judgment” looked at the ordinary meaning of the two words. “Independent” means “not subject to control of others” and “judgment” the action of judging or the mental or intellectual process of forming an opinion or evaluation by discerning and comparing. The Board used, as a starting point, that for one to exercise “independent judgment” “an individual must at a minimum act, or effectively recommend action, free of control of others and form an opinion or evaluation by discerning and comparing data.” The Board noted it was interpreting “independent judgment” in light of the contrasting statutory language, “not of an merely routine or clerical nature.” The Board stated; “It may happen that an individual’s assignment or responsible direction of another will be based on independent judgment within the dictionary definition of those terms, but still not rise above the merely routine or clerical.” The Board stated that its view, as well as the Supreme Court’s view was that actions fall into a spectrum between the extremes of completely free actions and completely controlled ones, “and the degree of independence necessary to constitute a judgment as ‘independent’ under the Act lies somewhere in between these two extremes.” The Board said it would find “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” (Footnote omitted.) However, the Board went on to state; “On the other hand, the mere existence of company policies does not eliminate independent judgment from decision making if the policies allow for discretionary choices. [footnote omitted]” The Board summarized as follows:

Section 2(11) contrasts “independent judgment” with actions that are “of a merely routine or clerical nature.” Thus, the statute itself provides a base line for the degree of discretion required to render the exercise of any of the enumerated functions of 2(11) supervisory. The authority to effect an assignment, for example, must be independent, it must involve a judgment, and the judgment must involve a degree of discretion that rises above the “routine or clerical.” [footnote omitted]

In deciding whether the two lieutenants herein are supervisors within the meaning of the Act I am mindful the security of nuclear facilities is highly regulated. I take guidance from *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), a case where the Board refined the analysis to be applied in assessing supervisory status and set forth clear broadly applicable guidance for situations like those herein.

First, I find the lieutenants are supervisors under Section 2(11) of the Act based on the fact they prepare evaluations of the security officers that, in part, are considered in determining whether the security officers are promoted. Lieutenants Frazier and Mack both, for some 2 years prior to their discharge, prepared quarterly and annual reviews or evaluations

for the security officers reporting to them. In fact, no one higher than a lieutenant at the Company regularly prepares written evaluations of security officers. Both Frazier and Mack reviewed the evaluations they prepared with the security officers involved before the evaluations were turned over to higher management. I note Frazier first explained the evaluations he made of the security officers that reported to him were simply to have the security officers improve their performance, but, he acknowledged bad evaluations could impact a security officer's consideration for promotion. The record evidence establishes evaluations created by lieutenants are specifically utilized in the promotional process. The Company's policy manual at "Promotion Policy and Procedure" requires, among the several stages in the promotion process, that a review of applicable performance appraisals be conducted by the promotion panel. More specifically, the promotion policy and procedures manual requires the Company's promotion board to review the personnel file of each applicant for promotion and to specifically review performance appraisals. Project Manager Mareth specifically stated evaluations made by lieutenants at the Company are utilized in the promotional process for security officers. Mareth even recalled four security officers whose recent promotions were impacted by their lieutenant's evaluations and he indicated there were perhaps eight other like situations where security officers' promotions were impacted by their lieutenant's evaluations in the previous year to year and half. I note Frazier and Mack did not need to consult with their superiors before evaluating their direct reports, nor did they need to discuss with their supervisors the content of evaluations before preparing and going over the evaluations with those evaluated. Frazier and Mack performed evaluations free from the control of others in management and made their evaluations and formed their opinions, it appears, by their own discernment and comparisons. It is clear evaluations impact promotions of the work force and are performed in the interest of the Company. In summary, Lieutenants Frazier and Mack independently performed evaluations for their direct reports which lead to personnel actions (namely promotions) affecting the security guards involved and by doing so engaged in one (promote) of the enumerated supervisory functions within the meaning of Section 2(11) of the Act.

Lieutenants, as first line supervisors, have the authority to and do issue discipline. The Company's progressive discipline policy and procedure "provides guidance on the administration of discipline" for its supervisors who "are responsible for administering this policy as it applies to employees under their supervision." As Project Manager Mareth explained, lieutenants can issue any type discipline, except termination, without consulting with a supervisor. Lieutenants are generally the individuals issuing the initial step(s) in the Company's progressive disciplinary process. The evidence establishes lieutenants have certain discretion when issuing discipline pursuant to the Company's policies. As Project Manager Mareth explained, a lieutenant may decide not to issue formal discipline at all, or to chose which level of discipline an infraction will be placed because of some overlap between levels. It is clear lieutenants exercise independent judgment by deciding whether to initiate the progressive disciplinary process in the first place and lay a foundation for future discipline against their direct reports. The Company presented, in evidence, examples of lieutenants issuing discipline to security officers. Two of the disciplines resulted in written warnings with a one day suspension in each. While none of the eight examples were initiated by Frazier or Mack it appears they clearly had the authority to do so. Frazier, for example, explained he never issued any discipline for the security officers that reported to him

because each knew and performed their job duties. In summary, lieutenants have the authority to issue security officers discipline and have in fact issued discipline up to and including suspension without the necessity of consulting with or obtaining approval of their superiors. I find such to establish that lieutenants of the Company are supervisors within the meaning of Section 2(11) of the Act.

It is clear shift captains prepare shift post assignments which are then disseminated to the lieutenants and security officers which reflect the initial post assignments for security officers on any given day. However, as Frazier testified, he had the authority to transfer security officers from one post to another for operational needs during a shift. Frazier, first stated he had to request approval from the shift captain, but then acknowledged he generally did not consult with the captain before making such changes in post assignments. Frazier explained some security officer's preferred one post assignment over other assignments during a shift. Thus in designating a place, a time, and tasks to be performed when he transferred a security officer from one post to another, Frazier engaged in a supervisory function within the meaning of the Act. The discretion Frazier, or other lieutenants, utilized in transferring security officers from one post assignment to another, in my opinion, involves a degree of discretion rising above the level of routine or clerical and is done in the interest of the Company.

Lieutenants provide direct oversight to security officers in the field and address issues that arise on the job. Lieutenants are directed to ensure that security officers assigned to them understand the specific requirements of their post, that they remain alert, attentive and perform their duties in a proper and safe manner, and that they properly maintain post reports. The lieutenants are to initiate prompt and appropriate action to identify and correct any deficiencies in the security officers including improper behavior, attitude or inattentiveness to duty. Project Manager Mareth explained lieutenants can be disciplined, up to and including discharge, if they fail to ensure the quality of the performance of the security officers assigned to them. Likewise, Mareth further explained, a failure on a lieutenant's part to ensure quality performance by the security officers could impact promotional opportunities for the lieutenant. Here lieutenants direct the work of security officers and have authority to take corrective action as appropriate and are subject to adverse consequences if they fail to properly direct the security officers that report to them. I find lieutenants responsibly direct the work of security officers within the meaning of Section 2(11) of the Act.

All the above establishes lieutenants are supervisors within the meaning of the Act. In addition to the above findings there are secondary indicia that further support my conclusion the lieutenants are supervisors. Lieutenants are paid more; provided additional insurance not provided to security officers, given additional training not given to security officers, attend management meetings that security officers do not attend, and, the Company views them as supervisors. The secondary indicia most compelling is if the lieutenants are not supervisors then each captain is responsible for 30 plus security officers with assigned duties at various locations on the thousands of acres at a nuclear facility.

In summary, I find the Company established that Thomas Frazier and Cecil Mack were supervisors within the meaning of Section 2(11) of the Act at all times material herein,

and not protected by the Act. I find the Company did not violate the Act when it suspended and thereafter, discharged Frazier and Mack on February 15, 2010.

**Conclusions of Law**

1. The Company is an employer engaged in commerce within the meaning of the Section 2 (2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of the of Section 2(5) of the Act.

3. Thomas Frazier and Cecil Mack were, at applicable times, supervisors within the meaning of Section 2(11) of the Act.

4. The Company has not violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>3</sup>

**ORDER**

The complaint is dismissed.

Dated Washington, D.C., June 27, 2011.

---

**William N. Cates**  
**Associate Chief Judge**

---

<sup>3</sup> If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.